LIM OH & ORS

v.

ALLEN & GLEDHILL

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-251-94]
7 OCTOBER 1998

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Two actions in respect of same cause of action - Whether res judicata - Whether an abuse of process - Matter not decided on merits - Whether issue estoppel could still apply - Rules of the High Court 1980, O. 15 r. 8(1)*

In 1986 the appellants had filed an action against a former legal assistant of the respondent and one Scotch Leasing Sdn Bhd ('the first suit'). The appellants then sought to include the respondent as a party to the first suit, but, having obtained the necessary order, failed to file the amended writ of summons and statement of claim within the statutory 14-day period. The appellants also did not apply for extension of time to amend the pleadings. Instead, on 20 March 1990, they filed a similar application to cite the respondent as a party to the first suit. However, having obtained the order to amend on 7 June 1990, the appellants again failed to affect the amendments within the 14-day period, and only did so on 15 October 1990 *albeit* without making an application for extension of time.

Upon the respondent's application, the appellants' amended writ of summons and statement of claim in the first suit aforesaid was set aside by the Senior Assistant registrar ('SAR') on 16 January 1991. The appellants did not appeal against the SAR's order, but elected instead to file a fresh writ of summons and statement of claim against the respondent ('the second suit'). On 3 April 1990 the SAR set aside the second suit on the grounds that it was *res judicata* and constituted an abuse of prosess. On appeal, the SAR's order was affirmed by the learned judge who ruled that issue estoppel applied and that the second suit, in any case, was an abuse of the court's process. The appellants appealed further and argued that issue estoppel, in the circumstances, could not apply as the matter was never decided on merits. The respondent argued that as the appellants had failed to appeal against the SAR's decision in the first suit, they were estopped from filing the second suit based on the same cause of action.

Held:
Per Shaik Daud Ismail JCA:

[1] Issue estoppel applies in this case. For issue estoppel to apply it is not necessary for the issue to be decided on merits. Once a point is distinctly put to issue and determined, and a judicial decision is final on that point, it cannot be ventilated in a fresh or new suit.

[2] The issue of the first suit, just like the issue of the second suit, was to make the respondent a party to the action. The appellants failed to do that because of their failure to comply with prescribed rules, and they also had not appealed against the SAR's order setting aside the amended writ. In the circumstances, the learned judge had made a correct finding when he ruled that issue estoppel applied as the issue of making the respondent a party to the action has been finally decided.

[3] The second suit was also an abuse of the process, since, having filed the first suit and obtained an order for its amendments, the appellants had admitted that the amendments were effected out of the prescribed period. It was also evident that when faced with the application to set aside the first suit, the appellants failed to apply for an extension of time to enable the amendments to be effected. And when the order striking out the first suit was made, the appellants could have appealed against it but failed to do so. This raises the presumption that the appellants failed to comply with the rules of court.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pada tahun 1986 perayu telah memfail satu tindakan terhadap seorang pembantu undang-undang responden dan Scotch Leasing Sdn Bhd ('tindakan pertama'). Perayu kemudiannya memohon untuk memasukkan responden sebagai satu pihak dalam tindakan pertama, tetapi, setelah memperolehi perintah yang berkenaan, gagal untuk memfail writ saman terpinda dan pernyataan tuntutan dalam tempoh statutori 14 hari. Perayu juga tidak memohon untuk lanjutan masa untuk meminda pliding mereka. Sebaliknya, pada 20 Mac 1990, mereka memfail permohonan yang serupa untuk memasukkan responden sebagai pihak dalam tindakan pertama. Bagaimanapun, setelah memperolehi perintah untuk meminda pada 7 Jun 1990, perayu sekali lagi gagal untuk melakukan pindaan dalam tempoh 14 hari, dan hanya berbuat demikian pada 15 Oktober 1990 itu pun tanpa membuat apa-apa permohonan untuk perlanjutan masa.

Ekoran permohonan responden, writ saman terpinda dan pernyataan tuntutan responden di atas telah diketepikan oleh Penolong Kanan Pendaftar ('PKP') pada 16 Januari 1991. Perayu tidak merayu terhadap keputusan PKP, sebaliknya bertindak dengan memfailkan satu writ saman dan pernyataan tuntutan yang baru terhadap responden ('tindakan kedua'). Pada 3 April 1991 PKP mengetepikan tindakan kedua atas alasan bahawa ianya *res judicata* dan merupakan suatu salahguna proses. Atas rayuan, perintah PKP ini telah disahkan oleh yang arif hakim yang memutuskan bahawa isu estopel terpakai, dan bahawa tindakan kedua, walau apa pun, merupakan suatu salahguna proses mahkamah. Perayu merayu lagi dan berhujah bahawa isu estopel, dalam halkeadaan kes, tidak terpakai kerana halperkara di sini tidak pernah diputuskan di atas merit. Responden berhujah bahawa oleh kerana perayu gagal merayu terhadap keputusan PKP dalam tindakan pertama, maka mereka adalah diestop dari memfailkan tindakan kedua yang didasarkan kepada kausa tindakan yang sama.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Isu estopel terpakai dalam kes ini. Untuk isu estopel terpakai ianya tidak perlu bahawa isu itu harus diputuskan di atas merit. Sebaik sahaja sesuatu hal itu menjadi isu dan diputuskan secara jelas, dan keputusan kehakiman atas hal itu sudah muktamad, ianya tidak lagi boleh dibangkitkan di dalam tindakan yang baru.

[2] Isu dalam tindakan pertama, sama seperti isu tindakan kedua, ialah untuk menjadikan responden sebagai satu pihak kepada tindakan. Perayu gagal berbuat demikian kerana kegagalan mereka mematuhi peraturan yang ditetapkan, dan mereka juga tidak merayu terhadap keputusan PKP mengetepikan writ terpinda. Dalam halkeadaan demikian, hakim yang bijaksana adalah betul bilamana beliau memutuskan bahawa isu estopel terpakai, oleh kerana isu berhubung menjadikan responden satu pihak kepada tindakan sudah pun diputuskan secara muktamad.

[3] Tindakan kedua juga merupakan suatu salahguna proses, oleh kerana, setelah memfail tindakan pertama dan memperolehi perintah untuk meminda, perayu mengakui bahawa pindaan dilakukan di luar tempoh. Ianya juga jelas bahawa apabila berhadapan dengan permohonan untuk mengetepikan tindakan pertama, perayu gagal memohon lanjutan masa untuk memasukkan pindaan. Dan apabila perintah mengetepikan tindakan pertama dibuat, perayu boleh sahaja merayu terhadapnya tetapi gagal berbuat demikian. Ini menimbulkan anggapan bahawa perayu gagal mematuhi kaedah-kaedah mahkamah.

[Rayuan ditolak.]

Cases referred to:
Cart-Zaiss-Stifung v. Rainer and Keeler Ltd & Ors (No 2) [1966] 2 All ER 536 ***(foll)***
Janor v. Morris [1983] 3 All ER 785 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 8(1)

For the appellants - CT Lee; M/s Fernandez & Co
For the respondent - Jennifer Chandran (Chin Yew Meng with him); M/s Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-1-22-102-91]

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court which had, on 28 September 1994, affirmed the decision of the senior assistant registrar to set aside the writ of summons and statement of claim of the appellant on the ground that the action was *res judicata* and also frivolous and vexatious and an abuse of the process of the court.

On 2 May 1986 the appellants filed an action in the High Court (the first suit) against one Low Kim Soon, a former legal assistant of the respondent and Scotch Leasing Sdn. Bhd. involving the alleged conduct of the said Low Kim Soon in handling the purchase of land resulting in alleged losses to the appellants. Some two years later, on 13 June 1988, the appellants filed an application to amend the writ of summons and statement of claim to include the present respondent as a party to the action. It is rather strange why the appellants, if they thought they had a cause of action, never thought to include the present respondent in the first suit, but only did so two years later. The appellants' application, however, was granted by the court on 24 January 1990. Now having obtained the order and by virtue of O. 15 r. 8(1) of the Rules of the High Court 1980 (RHC), the appellants are required to affect the amendments within 14 days from the date the order was made failing which the order would cease to have effect, without prejudice to the power of the court to extend the period. The appellants failed to do this within the stipulated period, and there was no application for the extension of the period.

Arising out of this failure as aforesaid, the appellants, once again by a summons in chambers dated 20 March 1990, filed another similar application. This second application was granted on 7 June 1990. Again the appellants failed to affect the amendments within the stipulated period of 14 days from 7 June 1990. The amendments were eventually effected on 15 October 1990,

four months after the stipulated period, without any application being made for an extension of time. This was in fact conceded to by the appellants. (See p. 85 of the appeal records).

Pursuant to such failure, the respondent by summons in chambers dated 27 November 1990 applied to set aside the amended writ of summons and statement of claim, and on 16 January 1991 the respondent's application was allowed by the senior assistant registrar. The appellants did not appeal against the senior assistant registrar's order, further evidence of their concession that they were indeed out of time. Instead the appellants filed a fresh writ of summons and statement of claim against the respondent (second suit).

The respondent entered conditional appearance to the second suit on 22 March 1991 and on the same date also filed an application to set aside the second suit on the grounds that *res judicata* would apply and that the filing of the second suit constitute an abuse of the process of the court. On 3 April 1991, the learned senior assistant registrar allowed the respondent's application. Not being satisfied with the learned senior assistant registrar's decision, the appellants appealed to the then Supreme Court, which allowed the appeal but ordered that the appeal to the judge in chambers be reheard by another judge. The matter was heard by another judge and he dismissed the appellants' appeal with costs against the learned senior assistant registrar's decision to strike out the second suit on the ground that issue estoppel applied and that the filing of the second suit constituted an abuse of the process of the court.

Learned counsel for the appellants argued that as the matter was never decided on its merits, issue estoppel does not apply. He argued that when the appellants' amended writ was set aside that decision was not based on merits but rather on a procedural mistake of the appellants' failure to file the amended writ of summons and statement of claim within the stipulated time pursuant to O. 15 r. 8(1) of the RHC.

Learned counsel for the respondent submitted that as the appellants failed to appeal against the learned senior assistant registrar's decision in the first suit, which was within their right to do so, they are now barred and estopped from filing this second suit based on the same cause of action.

After considering the arguments and the authorities cited we agree with the learned judge's finding that issue estoppel applies in this case. It is our view that for issue estoppel to apply it was not necessary for the issue to be decided on its merits. Once a point is distinctly put in issue and determined and a judicial decision is final on that point, then it ought not to be allowed to be ventilated in a fresh or new suit. We are fortified in this respect by the words of Lord Guest in *Cart-Zaiss-Stifung v. Rainer And Keeler Ltd. & Ors. (No. 2)* [1966] 2 All ER 536 at 565 when he said:

> What the learned judge did say in his judgment was, we quote, 'No doubt the giving of leave to defend cannot be said to be final judgment but in respect of issue estoppel the question is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality.'

We found that the issue in the first suit was to make the respondent a party to the action. The appellant failed to do that because of their failure to comply with prescribed rules. The learned senior assistant registrar decided that in the light of such failure, the amended writ ought to be set aside and he accordingly set it aside. The appellant chose not to appeal against that decision. The learned judge came to a finding that the issue of making the respondent a party to the action has been finally decided, and that the only purpose of filing the second suit was also to make the respondent a party, as the statement of claim in both suits are the same. It was on this premise that the learned judge held that issue estoppel applied and the commencement of the second suit was an abuse of the process of the court. We agree with that finding. In *Janor v. Morris* [1983] 3 All ER 785, where the plaintiff brought an action against the defendant for breach of contract, there was unexplained delay by the plaintiff in proceeding with the action and the action was ordered to be dismissed for want of prosecution unless the plaintiff served a summons for discretion by 1 April 1980. The plaintiff failed to comply with the order. On 2 July 1980 the action was dismissed. On 9 September 1980 the plaintiff brought a second action against the defendant raising the same cause of action as in the first action. On the application of the defendant the second suit was struck out it being held to be an abuse of the process of the court. On appeal, the judge in chambers allowed the appeal. The defendant appealed to the Court of Appeal. Watkins LJ at p. 785 said:

> In the event of his action being ordered to be struck out for failure to obey a pre-emptory order, he may appeal against that order seeking, if necessary, an extension of time within which to do so. The outcome of such an appeal will to some extent depend on the excuse for failure preferably set forth in affidavit form provided for the court's consideration. If a litigant neglects to avail himself of that procedure and brings a fresh but precisely similar action to that ordered to be struck out, without any explanation then or at any later time for a failure to obey the pre-emptory order, he should not be surprised that the commencement of second action is found to be an abuse of the process of the court and for that reason it, too is struck out.

We agree that the filing of the second suit was an abuse of the process of the court since after having filed the first suit and obtained an order for its amendments, the appellants had admitted that the amendments were effected out of the prescribed period. When faced with the application to set aside the first suit, the appellants again failed to apply for an extension of time to enable the amendments to be effected. This raises the presumption that the appellants

failed to comply with the rules of court. When the order striking out the 1st suit was made, the appellants could have appealed but failed to do so. The appellants felt that they could circumvent the need to appeal by instituting the second suit.

For the above reasons we dismissed the appeal with costs and ordered the deposit to go to the respondent to account of taxed costs.